SUPREME COURT, U. S.

DEC 23 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 793.

DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY,

Petitioner,

vs.

DIANE LONES, a minor, by her father and next friend, HOMER J. LONES and METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PROCEEDINGS IN THE COURTS BELOW.

This accident case was tried on an Amended Complaint and Answer in which the only issues presented to the jury were the negligence of the railroad, contributory negligence of the plaintiff and assumption of risk, the related issues of proximate cause and last clear chance, and the amount of the damages suffered. The jury was allowed under applicable Ohio law to decide under the evidence whether the defendant was negligent; whether the minor plaintiff was contributorily negligent or assumed the risk, and thereafter whether the railroad upon discovering her peril had exercised reasonable care to avoid injury to her.

At the end of all the evidence the District Court submitted the case to the jury on these issues and gave the jury correct instructions on all facets of the applicable Ohio law

The Court of Appeals found no prejudicial error in the trial of the case and affirmed the judgment of the District Court entered on the jury verdict for the plaintiff.

STATEMENT OF THE CASE.

A. Nature and Status of the Case.

This is an ordinary tort action growing out of a pedestrian-train accident decided under Ohio law. This case was originally filed in the State Court and removed to the Federal Court by the defendant because of diversity of citizenship. A jury verdict for the plaintiff was returned after full trial.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. The majority held that the evidence presented a jury issue and that all issues were properly submitted to the jury *in accordance with the applicable Ohio law.* The verdict and judgment was affirmed.

B. Counterstatement of Facts.

Petitioner's statement of facts turns all evidentiary disputes to resolve them in favor of Petitioner, yet Respondent will point out only a limited number of facts avoided in Petitioner's statement but included in the evidence and recited by the Court of Appeals in its opinion.

On the day of the accident the crossing signal had been activated for 20-25 minutes prior to the accident. The minor Respondent and her girl friend had been riding their bicycles in the area during the time that the crew was working near the crossing and had passed over the grade crossing against the signal at least one time before the accident. Some of the train crew had seen the children playing at or near the crossing.

As Diane approached the crossing again the train crew was in the process of making a "flying switch" by which

cars at the end of the train are switched onto the sidetrack with sufficient momentum to permit coupling with other cars on the sidetrack. The engine sped down and onto the crossing and stopped in front of Diane. There is a conflict in evidence as to whether the engines were on the crossing, approaching it or just past when Diane rode upon the sidetrack.

At this time a cut of three cars south of the crossing was floating freely down the sidetrack as a result of the flying switch maneuver. One crew member was on the rear of the first car of the cut of cars to brake the cut and otherwise to control the coupling of the cut with other cars north of the crossing.

Evidence is in conflict whether Diane stopped her bike on the sidetrack or between the two tracks. Likewise, evidence is conflicting whether the engineer or other crew members saw Diane on the crossing as the train approached the crossing, when the train came onto the crossing, or after the train was on the crossing. In any case, as a result of the noise of the diesel engines in front of her Diane did not hear the cut of cars coming down the sidetrack and became aware of the danger only from the shouted warnings of either her friends, who had also come down near the crossing, or the members of the train crew. In response to the warnings Diane either stepped backward slightly or turned to look over her shoulder, but she saw the danger too late to avoid being struck by the cut of cars.

Evidence was adduced that the engineer had adequate time to sound a clear distress or danger signal to warn the brakeman to stop the cut of cars, but he failed to do so.

Diane had seen trains on the main track and had seen trains on the elevator siding, but had never seen trains or movements of cars on both tracks at the same time. She had never seen two trains in the area of the crossing at the

same time. She had never seen cars moving by themselves before. She had not known what a switching movement or flying switch or drop involved and never saw cars being switched. She had seen the flashers operating but understood only that they indicated a warning regarding the one train she already saw in front of her on the main track. She had seen the train on the main track before going onto the crossing but because of the angle of tracks and the deception of the train before her, like her companions, never saw the cut of cars floating down upon her. She placed herself in what to her childish mind was a position of safety between the two sets of tracks and back from the only danger she appreciated at the crossing, that is, the train stopped on the main track in front of her. She continued to stand watching the train in front of her on the main track until run down from the left rear.

ARGUMENT.

I. Is a state standard or federal standard applicable to determine the sufficiency of the evidence to support a jury verdict in federal court where jurisdiction is based on diversity of citizenship?

The function of the Supreme Court of the United States is not to write advisory opinions on hypothetical questions. The issue which Petitioner seeks to raise here might present an interesting question in other Circuits; but it is meaningless in this case where the Court of Appeals held:

(1) The Ohio standard, which Petitioner *rightly* urges should be applicable, *was* the standard used by the Court of Appeals.

(2) The Ohio standard and the Federal standard are the same.

Whether, as the Court of Appeals has said, the Ohio standard and the Federal standard are the same or not, this case *was* decided in accordance with Ohio law.

As the Court repeatedly emphasized:

"* * * we find that the issue of contributory negligence was properly submitted to the jury under an accurate instruction of *Ohio* law."

"The District Court * * * [on] last clear chance * * * gave a fair and complete instruction on the applicable law of Ohio."

"We find * * * that the minor plaintiff was not negligent per se under Ohio law and *that sufficient evidence was presented under both the federal standard and the Ohio standard to take the issue of contributory negligence to the jury.*" (Emphasis added.)

The question thus is not whether a state or a federal rule is the appropriate and applicable legal standard. Peti-

tioner is really asking this Court to weigh the quantum of evidence to determine if it satisfies the requirements of Ohio law.

The Court of Appeals rejected and Respondent has never argued for application of the "Federal standard," and further rejects the argument of Petitioner that the "Federal standard" is different, i.e. less demanding than the Ohio standard.

As the Court of Appeals in this case pointedly stated, in commenting on the conflict which seems to exist between some Circuits:

> "* * * we will not reach out to decide the issue since it appears that the Ohio standards and the Federal standards are the same. *Dickerson v. Shepard Warner Elevator Co.*, 287 F. 2d 255, 258 (6th Cir. 1961)."

After quoting the "Federal standard" as stated in *Lavender v. Kurn*, 327 U. S. 645 (1946) the majority said this:

> "The Ohio courts phrase the standard in a different manner, stating that the court must construe the evidence and all permissible inferences from the evidence in a light most favorable to the non-moving party and that matters of weight and credibility are not for the court, *Cothey v. Jones-Lemley Trucking Co.*, 176 Ohio St. 342, 199 N. E. 2d 582 (1964); *but the resulting application of the rule is the same.*" (Emphasis added.)

Lavender v. Kurn, 327 U.S. 645 (1946), is indeed a Federal Employers' Liability Act case. It is cited by the Court of Appeals, but not to suggest that the "scintilla rule" is the federal rule in common law cases. Indeed, though in F.E.L.A. cases the evidentiary basis to support a verdict may be close to the "scintilla" rule, *Lavender* itself does not adopt the scintilla rule as such. Indeed the

headnote in *Lavender* is good Ohio law even in common law cases.

Petitioner is therefore asking this Court to find that (1) there is a conflict between the Ohio standard and the Federal standard in diversity cases, where in fact no such conflict exists and further (2) that the Court of Appeals applied the Federal standard and not the Ohio standard, where in fact the Court clearly applied the Ohio law, found that there was substantial evidence to support the verdict for plaintiff, and made it clear that the Federal standard requiring "substantial evidence" is the same as the Ohio standard.

This Court should find that no justiciable question exists in *this* case as to the correct, applicable standard which should have been and was applied by the lower Courts.

The conflict in other Circuits may need to be resolved at some time by this Court; however, this is not the case for it.

II. Is the standard in Federal Employers Liability Act cases the applicable standard for determining the sufficiency of the evidence to support a jury verdict in common law negligence cases in the federal courts?

There is no basis in the record for raising this question. The "standard in Federal Employers Liability Act cases" was not applied by the trial Court or the Court of Appeals in determining the sufficiency of the evidence.

Petitioner has never claimed that the law given to the jury was the special standard applicable to F.E.L.A. cases. Neither the trial Court nor the Court of Appeals has subscribed to the principle that the F.E.L.A. standard applied to this case, nor was the case decided on the basis of an F.E.L.A. standard rather than the state standard.

Ohio law and Ohio standards were used in the resolution of the very simple issues in this accident case and the question as posed by Petitioner is wholly inapplicable to this record.

III. Should this Court exercise its power of supervision over lower courts which decide important state questions in conflict with applicable state law?

There is no doubt that this Court possesses the power of supervision over lower courts. This power is not to be exercised when the Court of Appeals has made it abundantly clear that it was deciding a state question in full accord with applicable state law. This is particularly true where both the trial and the appellate courts, applying state law correctly, found a justiciable jury issue.

Petitioner repeats here exactly what was argued on motion for rehearing before the Court of Appeals—that the Court of Appeals misstated or misconstrued Ohio law. Briefed and argued fully, these identical contentions were rejected by the Court and the motion for rehearing denied.

Ohio law does say that "if there is any doubt or question [in the mind of the trial judge] as to the child's being of an age and capacity that will enable it to exercise care for its safety, *that* question should be submitted to the jury. The Supreme Court of Ohio has said in this respect that each case must stand on its own footing * * *." (Emphasis added). 39 OHIO JURISPRUDENCE 2d, *"Negligence,"* p. 807; *Gottesman v. Cleveland*, 142 Ohio St. 410.

It is also true that *under some circumstances* a minor can be found to be negligent *per se*, and in some circumstances a Court may find the fact to be that the minor was negligent. *Karr v. McNeil*, 92 Ohio App. 458 (1952); *Carano v. Cordina*, 115 Ohio App. 30 (1961).

As to the effect of the so-called "judicial admissions"

of the minor Respondent, Petitioner repeats here the error of its argument in the Court of Appeals. Petitioner confuses judicial admissions, which may be conclusive, with evidence which is disputed and conflicting and capable of resolution only by the trier of the facts, the jury. There was substantial evidence from the minor Respondent and from other witnesses which required the Court to submit this case to the jury—all of which was done in accordance with the law of Ohio. The Witnesses' credibility and the weight to be given their testimony were matters for the jury. *Dickerson v. Shepard Warner Elevator Co.*, 257 F. 2d 255, 259 (6th Cir. 1961). A fair reading and analysis of the cases cited by Petitioner will demonstrate no error in the Court of Appeals interpretation of Ohio law on these points.

CONCLUSION.

The questions stated as presented for review are not in fact presented by the record herein. Question I is interesting but it is not raised by the evidence or the law of this case. Question II is answerable with an unequivocal "No," but is irrelevant to our case where the F.E.L.A. standard was not in fact applied. Question III must theoretically be answered "Yes," but does not warrant action by the Court in this case since the lower Court acted properly in applying the correct Ohio law.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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